Supreme Court, U. S.
FILED
MAY 1 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1317

DOROTHY NELL HUNT,
Petitioner,

VERSUS

STATE OF OKLAHOMA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF
THE STATE OF OKLAHOMA

RESPONDENT'S BRIEF IN OPPOSITION

JAN ERIC CARTWRIGHT
Attorney General of Oklahoma

DAVID W. LEE
Assistant Attorney General
Chief, Criminal Division

112 State Capitol Building
Oklahoma City, Oklahoma 73105
(405) 521-3921

Counsel for Respondent
State of Oklahoma

April, 1980

UTTERBACK TYPESETTING CO. — PHONE 235-0030 — 3740 S. HOLLIDAY AVE. — OKLA. CITY, OKLA. 73115

TABLE OF CONTENTS

	PAGE
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
QUESTIONS PRESENTED	5
STATEMENT OF THE CASE	5
REASONS WHY THE WRIT SHOULD BE DENIED	8
1. The Oklahoma Statute Which Regulates Obscene Films, 21 O.S. § 1040.51, Is Not Unconstitutionally Vague and Overbroad Since the Statute Specifically Prohibits the Sale of Moving Pictures of Persons in the Act of "Sexual Intercourse or Unnatural Copulation" and Has Been Construed to Incorporate the Miller Standards as Well	8
2. The Oklahoma Statute Which Permits the Oklahoma Court of Criminal Appeals to Modify a Defendant's Sentence Does Not Deprive a Defendant of a Fair and Impartial Trial by Jury	10
3. The Prosecutor Has the Authority and the Discretion Under Both State and Federal Law to Choose Whether to Charge a Defendant Under Either a Felony or a Misdemeanor Statute for the Same Act	11
4. In the Present Case, the Failure of the Trial Court to Give the Defendant's Requested Scienter Instruction Was Not a Reversible Error in View of the Evidence Presented and the Content of the Requested Instruction Itself	12
CONCLUSION	14
CERTIFICATE OF SERVICE follows Brief.	

TABLE OF AUTHORITIES

Cases	PAGE
Cherokee News & Arcade, Inc. v. State, 533 P.2d 624 (Okl.Cr. 1974)	8
Combs v. State, 536 P.2d 373 (Okl.Cr. 1975)	8
Donnelly v. DeChristoforo, 416 U.S. 637 (1974)	10
Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)	9
Hamling v. United States, 418 U.S. 87 (1974)	9, 12
Hanf v. State, 560 P.2d 207 (Okl.Cr. 1977)	13
Henderson v. Kibbe, 431 U.S. 145 (1977)	13
Luker v. State, 552 P.2d 715 (Okl.Cr. 1976)	10
McCrary v. State, 507 P.2d 924 (Okl.Cr. 1973)	11
McCrary v. State, 533 P.2d 629 (Okl.Cr. 1974)	8
Miller v. California, 413 U.S. 15 (1973)	8
Sallee v. State, 544 P.2d 902 (Okl.Cr. 1975)	12
Schneble v. Florida, 405 U.S. 427 (1972)	10
Smith v. California, 361 U.S. 147 (1959)	12, 13
Splawn v. California, 431 U.S. 595 (1977)	9
United States v. Batchelder, ___ U.S. ___, 99 S.Ct. 2198, 47 L.W. 4611 (June 4, 1979)	11
Ward v. Illinois, 431 U.S. 767 (1977)	9
U. S. Constitution	
Amendment I	2
Amendment VIII	2
Amendment XIV	2, 10
Statutes	
28 U.S.C. § 1257(3)	1
21 O.S. 1971, § 1040.51	2, 5, 8, 9
21 O.S. 1971, § 1066	3, 5, 10
22 O.S. 1971, § 926	4, 10

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1317

DOROTHY NELL HUNT,
Petitioner,

VERSUS

STATE OF OKLAHOMA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Jan Eric Cartwright, Attorney General of the State of Oklahoma, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the Oklahoma Court of Criminal Appeals entered on October 10, 1979.

OPINION BELOW

The opinion of the Court of Criminal Appeals is reported at 601 P.2d 464 (Okl.Cr. 1979).

JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on October 10, 1979. A petition for rehearing was denied on November 13, 1979. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Eighth Amendment to the United States Constitution provides as follows:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides in part:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 21 O.S. § 1040.51 provides as follows:

> *"Pictures, movies, etc. showing acts of sexual intercourse or unnatural copulation prohibited—Exceptions —Penalties.* — Any person who knowingly buys, sells, barters, traffics in, or causes to be delivered or transported in Oklahoma, any picture, moving picture, series of pictures, drawing, diagram or photograph of any person or animal or caricature thereof in an act or acts of sexual intercourse or unnatural copulation shall be deemed guilty of a felony, and shall be punished by a fine of not to exceed Twenty-five Thousand Dollars ($25,000.00), or by imprisonment for not to exceed fifteen (15) years, or by both such fine and imprisonment. Provided, that nothing contained herein shall prohibit the use of any of the above mentioned items pursuant to medical prescription by a duly licensed physician in the State of Oklahoma, or in recognized schools of medicine or veterinary science for educational purposes. The provisions of this Act shall not apply to any motion pictures produced or manufactured as commercial motion pictures which (1) have the seal under the Production Code of the Motion Picture Association of America, Inc.; or (2) are legally imported from foreign countries into the United States and have been passed by a Customs Office of the United States Government at any port of entry."

Title 21 O.S. § 1066 reads as follows:

> *"Power of appellate court—Return by clerk of lower court when new trial granted.* — The Appellate Court may reverse, affirm or modify the judgment appealed from, and may, if necessary or proper, order a new trial. In either case, the cause must be remanded to the court below, with proper instructions, and the opinion of the court, within the time, and in the manner, to be prescribed by rule of the court.
>
> "If the case is reversed for a new trial, the clerk of the court from which such cause was appealed is required to make return showing that said case was specifically called to the attention of the trial court at the time of the setting of the docket following receipt

of mandate, and showing the court's action in placing said cause on the docket for trial, said return to be made immediately after the trial and entry of judgment, or earlier disposal. Should the case not be retried and should it be dismissed by the court, return shall be made, giving the reasons stated by the court in his minutes justifying such dismissal."

Title 22 O.S. § 926 provides as follows:

"*Punishment, jury may assess, when.* — In all cases of a verdict of conviction for any offense against any of the laws of the State of Oklahoma, the jury may, and shall upon the request of the defendant assess and declare the punishment in their verdict within the limitations fixed by law, and the court shall render a judgment according to such verdict, except as hereinafter provided."

QUESTIONS PRESENTED FOR REVIEW

1. Is the Oklahoma statute, 22 O.S. § 1040.51, which prohibits the sale of moving pictures of persons in the act of "sexual intercourse or unnatural copulation" and which has incorporated the *Miller* standards, unconstitutionally vague?

2. Does the Oklahoma statute, 22 O.S. § 1066, which permits the Oklahoma Court of Criminal Appeals to modify a defendant's sentence, deprive a defendant the right to a fair and impartial trial by jury?

3. Does the fact that under Oklahoma law a prosecutor has discretion as to whether to file a felony or a misdemeanor charge against a defendant for the same act constitute a denial of due process?

4. Is the failure of the trial court to give a scienter instruction reversible error in every case, despite the fact that it is clear beyond a reasonable doubt from the evidence presented that the defendant was aware of the contents of the material which she sold?

STATEMENT OF THE CASE

Dorothy Nell Hunt (hereinafter referred to as petitioner) was charged by Information in the District Court of Tulsa County, State of Oklahoma with the crime of Unlawful Sale of a Movie Showing Acts of Sexual Intercourse or Unnatural Copulation Which is Obscene in violation of 21 O.S. § 1040.51.

Petitioner was represented by counsel and convicted by a jury on March 3, 1976. At trial the evidence presented by the State revealed that an undercover officer with the

Tulsa Police Department went to petitioner's apartment in Tulsa with a companion. The companion asked petitioner if she "had some films with some good stuff in it" (Tr. 111). The petitioner went to her kitchen and returned with some materials, including the film "Aphrodisia, California Orgies." The film was in a box upon which was a picture of a couple engaged in sexual acts (Tr. 120). The officer purchased the film along with another film, three magazines, and a deck of cards (Tr. 128). The film purchased by the officer, "Aphrodisia, California Orgies," was shown to the jury and was the basis of petitioner's conviction. In her defense petitioner presented four (4) witnesses, a psychologist (Tr. 151), a theatre manager (Tr. 197), and two (2) clerks from different adult bookstores (Tr. 197, 205). The petitioner (defendant) was also allowed to show the jury the film "Naked Came the Stranger," which was then playing at a local movie theatre (Tr. 180, 216).

At the close of the evidence the jury received their instructions, two of which were as follows (R. 39, 40):

INSTRUCTION NUMBER 3

"You are instructed that under the laws of the State of Oklahoma, any person who knowingly buys, sells, barters, traffics in, or causes to be delivered or transported in Oklahoma, any moving picture, among other things not relevant hereto, of any person or animal or caricature thereof engaged in an act or acts of sexual intercourse or unnautral copulation which is obscene, as that term is hereinafter defined, is deemed guilty of a felony, and is subject to being punished by a fine of not to exceed Twenty-five Thousand Dollars ($25,000.00), or by imprisonment for a term not to exceed Fifteen (15) years, or by both such fine and imprisonment both certain exceptions not relevant hereto" (R. 39).

INSTRUCTION NUMBER 4

"The word 'obscene', as used in the preceding in-instruction, includes certain essential ingredients or conditions, all of which must be present, in order for a moving picture to be deemed 'obscene'. These ingredients or conditions which must be present are as follows:

"1. The moving picture must depict, in a patently offensive way, an act or acts of sexual intercourse or unnatural copulation; and

"2. In addition thereto, the moving picture must patently offend contemporary community standards; and

"3. In addition thereto; the moving picture, when such community standards are applied, must have as its dominant theme an appeal to the prurient interest of the average person when taken in its entirety; and

"4. In addition thereto, the moving picture must have no serious literary, artistic, political or scientific value." (R. 40).

The jury returned with a verdict of guilty and a punishment of three (3) years in prison and a fine of $15,000.00, a sentence which was subsequently imposed by the trial court.

Petitioner appealed her conviction to the Oklahoma Court of Criminal Appeals, which affirmed petitioner's conviction. However, the court modified the sentence imposed by the jury, stating that although there was "no doubt" of petitioner's guilt, it was "highly likely" that the prosecutor's argument, in which he discussed the impact of pornography on the community, influenced the jury to return a more severe punishment than they might otherwise have.

REASONS WHY THE WRIT SHOULD BE DENIED

1. THE OKLAHOMA STATUTE WHICH REGULATES OBSCENE FILMS, 21 O.S. § 1040.51, IS NOT UNCONSTITUTIONALLY VAGUE AND OVERBROAD SINCE THE STATUTE SPECIFICALLY PROHIBITS THE SALE OF MOVING PICTURES OF PERSONS IN THE ACT OF "SEXUAL INTERCOURSE OR UNNATURAL COPULATION" AND HAS BEEN CONSTRUED TO INCORPORATE THE *MILLER* STANDARDS AS WELL.

The petitioner contends that the statute under which she was prosecuted and convicted, 21 O.S. § 1040.51, is unconstitutionally vague and overbroad on its face. The respondent (hereinafter referred to as "the State") respectfully submits that it has fully complied with the mandates of *Miller* v. *California,* 413 U.S. 15. *Miller* required that the sexual conduct that is to be prohibited in films must be "specifically defined by the applicable state law. . . ." 413 U.S. at 24. Title 21 O.S. § 1040.51 is specific in that it prohibits the sale of moving pictures of acts of "sexual intercourse or unnautral copulation." In addition, the Oklahoma Court of Criminal Appeals has incorporated the other *Miller* standards into this statute. *Combs* v. *State,* 536 P.2d 373, 375-376 (Okl.Cr. 1975). The State disagrees with the statement by petitioner at page 9 of her Petition for Writ of Certiorari that "the Oklahoma Court recognized the unconstitutionality of the statute prior to *Miller,* supra, . . ." The cases cited by the petitioner, *McCrary* v. *State,* 533 P.2d 629 (Okl.Cr. 1974) and *Cherokee News & Arcade, Inc.* v. *State,* 533 P.2d 624 (Okl.Cr. 1974), dealt with different statutes than the one under which petitioner in the present case was prosecuted. Furthermore, in those cases the Court

of Criminal Appeals applied a "saving construction" to those statutes and found them to be constitutional as construed in accordance with *Miller* v. *California,* supra.

Additionally, the conduct proscribed by 21 O.S. § 1040.51 is more than mere nudity. *Cf. Erznoznik* v. *City of Jacksonville,* 422 U.S. 205. Furthermore, the *Miller* construction and the instructions in the present case insure that even the depiction of "sexual intercourse or unnatural copulation" cannot be prohibited unless the film depicts such "in a patently offensive way", must "patently offend contemporary community standards", has "as its dominant theme an appeal to the prurient interest of the average person when taken in its entirety", and "must have no serious literary, artistic, political or scientific value" (R. 39, 40).

The statute, as construed, compares favorably with other statutes which have been upheld by the United States Supreme Court and is, therefore, in accord with the applicable decisions of this Court. See *Ward* v. *Illinois,* 431 U.S. 767, where the Supreme Court upheld an Illinois obscenity statute, as construed, prohibiting the sale of obscene material as defined by previous judicial decisions of the Illinois Supreme Court. 431 U.S. at 771-773. See also *Splawn* v. *California,* 431 U.S. 595. In *Hamling* v. *United States,* 418 U.S. 87, the Supreme Court upheld the federal obscenity statute which prohibited the sending of "obscene, lewd, lascivious, indecent, filthy or vile" materials through the mail and to which the *Miller* standards were applied.

The State therefore contends that Oklahoma's statute regulating obscene films is in accord with the constitutional requirements mandated by this Court.

2. THE OKLAHOMA STATUTE WHICH PERMITS THE OKLAHOMA COURT OF CRIMINAL APPEALS TO MODIFY A DEFENDANT'S SENTENCE DOES NOT DEPRIVE A DEFENDANT OF A FAIR AND IMPARTIAL TRIAL BY JURY.

Petitioner next contends that 22 O.S. § 1066 deprives her of a trial "on the facts of the matter" by a fair and impartial jury by allowing the Court of Criminal Appeals to modify a sentence which a defendant has appealed from. It should be noted that in Oklahoma the jury is the sentencing authority, and the trial courts are without power to modify the punishment assessed by the jury since this authority is vested exclusively with the Court of Criminal Appeals. 22 O.S. § 926; *Luker* v. *State,* 552 P.2d 715, 719 (Okl.Cr. 1976). In the present case the Court of Criminal Appeals modified the sentence because the prosecutor discussed the impact of pornography on the community in his closing argument. The court found that the remarks were error, but found that because there was "no doubt" of petitioner's guilt, it was highly likely that the argument influenced the jury to return a more severe punishment than they might otherwise have.

The court's finding that there was "no doubt" as to petitioner's guilt is consistent with the harmless error rule which has been approved by this Court. *Schneble* v. *Florida,* 405 U.S. 427. It is submitted that the remarks of the prosecutor in the present case did not constitute a denial of fundamental rights under the Fourteenth Amendment. *Donnelly* v. *DeChristoforo,* 416 U.S. 637. Oklahoma's statute allowing the modification of a sentence should be viewed independently of the finding of harmless error by

the Court of Criminal Appeals. The fact that this statute allows the court to reduce sentences in cases where guilt is clear but a trial error has occured which affected the punishment set by the jury, should not be found to violate the fact finding function of the jury. The State contends that in view of the State's compliance with the principles of the harmless error rule by specifically finding that there was "no doubt" as to petitioner's guilt, no significant federal question has been raised by this contention.

3. THE PROSECUTOR HAS THE AUTHORITY AND THE DISCRETION UNDER BOTH STATE AND FEDERAL LAW TO CHOOSE WHETHER TO CHARGE A DEFENDANT UNDER EITHER A FELONY OR A MISDEMEANOR STATUTE FOR THE SAME ACT.

Petitioner contends that the fact that the same act can be prosecuted as either a felony or a misdemeanor at the discretion of the prosecutor constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. It should be pointed out that in her brief before the Oklahoma Court of Criminal Appeals the petitioner claimed that her Eighth Amendment rights had been violated instead. The State further notes that petitioner's contention has been rejected by the United States Supreme Court in *United States* v. *Batchelder,* ___ U.S. ___, 99 S.Ct. 2198, 47 L.W. 4611 (June 4, 1979), and the Oklahoma Court of Criminal Appeals, both in the present case and an earlier one. *McCrary* v. *State,* 507 P.2d 924, 927 (Okl.Cr. 1973), remanded, 414 U.S. 966; aff'd 533 P.2d 629 (Okl.Cr. 1974).

4. IN THE PRESENT CASE, THE FAILURE OF THE TRIAL COURT TO GIVE THE DEFENDANT'S REQUESTED SCIENTER INSTRUCTION WAS NOT A REVERSIBLE ERROR IN VIEW OF THE EVIDENCE PRESENTED AND THE CONTENT OF THE REQUESTED INSTRUCTION ITSELF.

In Argument IV the petitioner contends that reversible error occurred when the trial court "failed to give a scienter instruction." In Oklahoma, where counsel is not satisfied with the instructions that are given or desires the trial court to give any particular instruction, it is the duty of counsel to prepare and present it to the trial court. *Sallee* v. *State,* 544 P.2d 902, 907 (Okl.Cr. 1975). In the present case the petitioner's proposed instructions concerning scienter requested the court to instruct the jury that the prosecution must prove that petitioner "knew the publications were obscene." (R. 69, 70, 71).

In *Hamling* v. *United States,* supra, the Supreme Court rejected the defendant's argument that scienter requires the government to prove that a defendant had an awareness of the obscene character of the material. 418 U.S. 87, 119-124. The Court held that, consistent with the holding of *Smith* v. *California,* 361 U.S. 147, the prosecution does not have to prove the defendant's knowledge of the legal status of the materials he distributes but only knowledge of the contents of such material. Therefore, the proposed instructions of petitioner relating to scienter were based on First Amendment theories rejected in *Hamling* v. *United States,* supra.

Furthermore, the information charging the petitioner and instructions given by the trial court use the word

"knowingly" in describing the conduct prohibited by law (R. 18, 39). The State contends that this general scienter instruction should be sufficient in absence of an exact *Smith* v. *California* proposed instruction submitted by the petitioner and in view of the facts in this case. "An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Henderson* v. *Kibbe,* 431 U.S. 145, 155.

It should be noted that there was never any serious contention at trial that the petitioner did not know what she was selling. The record reveals that a third party asked petitioner "if she had some films with some good stuff in it . . ." (Tr. 111), and the petitioner showed the officer two films, a deck of cards, and three magazines. The Court of Criminal Appeals noted that the cards and the magazines showed sexual intercourse, and "the box in which the film was packaged showed a woman committing fellatio." 601 P.2d at 469. In their closing arguments petitioner's attorneys argued not that the petitioner did not know what she was selling, but that the film was not obscene (Tr. 248-258). The Oklahoma Court of Criminal Appeals, therefore, determined that while the failure to give a proper scienter instruction "raises genuine problems," it was harmless error. The court recognized that the trial took place prior to their decision rendered in *Hanf* v. *State,* 560 P.2d 207 (Okl.Cr. 1977), in which the Court of Criminal Appeals set forth a model instruction based upon *Smith* v. *California,* supra, for the trial courts in Oklahoma to follow.

In view of the foregoing facts, the Court of Criminal Appeals was correct in finding that the failure to give the *Hanf* instruction was harmless error.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JAN ERIC CARTWRIGHT
Attorney General of Oklahoma

DAVID W. LEE
Assistant Attorney General
Chief, Criminal Division

112 State Capitol Building
Oklahoma City, Oklahoma 73105
(405) 521-3921

Counsel for Respondent
State of Oklahoma

April, 1980

CERTIFICATE OF SERVICE

On this _____ day of April, 1980, 3 (three) true and correct copies of the foregoing Brief in Opposition were served as prescribed by the Rules of this Court, by placing same in the U. S. Mail, postage fully prepaid, to:

Don E. Gasaway
1850 South Boulder
Tulsa, Oklahoma 74101

_____

David W. Lee